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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

APR 14 1993

Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of

EZ Communications, Inc.For Renewal of the License of FM Radio
Station WBZZ (FM) on Channel 229B at
Pittsburgh, Pennsylvania**Allegheny Communications Group, Inc.**For a Construction Permit for a New FM
Broadcast Station on Channel 229B at Pit-
tsburgh, Pennsylvania

MM Docket Number

93-88

To: Honorable Edward Luton
Administrative Law Judge**OPPOSITION TO MOTION TO CERTIFY**

EZ Communications, Inc., (EZ), the applicant for renewal of the license of radio station WBZZ(FM), in Pittsburgh, Pennsylvania, files herewith, by its attorneys, its Opposition to the Motion to Certify Hearing Designation Order to the Commission filed by Allegheny Communications Group, Inc. (Agony), a mutually exclusive applicant for a permit to construct a new FM radio station in Pittsburgh.

Agony seeks certification of the *Hearing Designation Order*¹ (HDO) to the extent that it denied Agony's Petition to Deny the WBZZ(FM) license renewal application. Section 1.115(e)(5) of the Rules, pursuant to which Agony seeks this extraordinary relief, provides:

¹ EZ Communications, Inc., DA 93-361, released April 5, 1993).

"Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling **question of law** as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation." (Section 1.115(e)(3), emphasis added).

According to Agony, the standard for determining whether there is a "substantial ground for difference of opinion" is whether "the available facts can possibly be read to support" a conclusion other than the one set forth in the *HDO* (Agony Petition, p. 13). It is difficult to conceive of **any** set of facts which could not "possibly be read to support" more than one conclusion, particularly by counsel for a disappointed applicant. Agony has cited no precedent consistent with this thesis, and we have found none. Agony's thesis is, of course, absurd. Were the standard for grant of the extraordinary relief sought by Agony that broad, certification to the Commission of applications for review of hearing designation orders would not be extraordinary at all. They would be routine occurrences, which they plainly are not.²

Moreover, Section 1.115(e)(3) deals with controlling questions of law, not differences of opinion about facts, and here there is no "controlling question of **law** as to which there is a substantial ground for difference of opinion" (emphasis

² We have found no cases construing the language of Section 1.115(e)(3). However, it seems obvious that the Commission did not invite applications for review of hearing designation orders merely because counsel for a disappointed applicant might, with sufficient ingenuity and poetic license, have written them differently. Certification and review might well be appropriate if a hearing designation order set forth a legal position directly contrary to accepted law, or to a position adopted by the Review Board and it were necessary to resolve the conflict between subordinate entities. Plainly, neither is the situation here.

added); Agony cites none beyond its generalized contention that the matters it raised in its Petition to Deny might conceivably place EZ's licensee qualifications in doubt, and that its Petition to Deny was therefore required to be granted (Agony Motion, p. 8). That is not the law. Rather, the law is that "Congress intended to vest in the FCC a large discretion to avoid time-consuming hearings . . . whenever possible," *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965), and "the Commission must look into the possible existence of a fire **only** when it is shown a good deal of smoke." (*Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985) (emphasis added). Here the only smoke is

- ▶ Contrary to the *HDO*'s factual conclusion that Ms. Randolph did not threaten to file a petition to deny or informal objection and that EZ made no payment to induce her not to do those things (*HDO*, ¶15), Agony contends that the *HDO* "is just plain wrong." (Agony Motion, p 17)⁴.
- ▶ Contrary to the *HDO*'s conclusion that "there is no evidence that the allegedly offensive remarks" about Ms. Randolph were "made in the context of a news broadcast or were intended to constitute news" and that "given the entertainment context of the statements, we do not believe that the listening public would construe the statement as news."⁵ (*HDO*, ¶16), Agony contends (apparently) that the broadcast matter in question **was**, in fact, news (Agony Motion, p. 19).

Alleged factual errors in a Hearing Designation Order do not constitute a

valid basis for certification pursuant to Section 1115(a)(2), and here is an example


a post-hearing remand to resolve any of the matters alluded to by Agony, and there is no basis for certification.

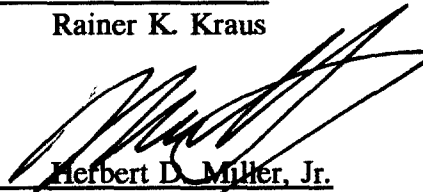
Conclusion

The Agony Motion is patently frivolous and sets forth no reasonable basis for certification to the Commission of an application for review of the *HDO*. It should be denied.

Respectfully submitted,

EZ Communications, Inc.

By  /s/ Rainer K. Kraus
Rainer K. Kraus

By  /s/ Herbert D. Miller, Jr.
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April 14, 1993

Certificate of Service


I, Richard Massie, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by First Class United States Mail, postage prepaid:

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/s/ Richard Massie
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April 14, 1993